



DEPARTMENT OF ENVIRONMENTAL PROTECTION COMMISSIONER'S OFFICE

Memo

To: DEP Employees

From: Commissioner McCarthy

Date: March 5, 2009

Re: Enforcement Penalty Calculations in the Face of Challenging Economic Climate

In the present extraordinarily difficult economic times, it is imperative that we continue to focus on our mission to protect public health and safety, the environment, and the natural resources of the state. This requires maintaining the integrity of our regulatory programs including compliance with our laws and regulations through the implementation of strong permitting and enforcement programs. At the same time, we must recognize the ever increasing and potentially unprecedented financial challenges of the regulated community to meet their basic operational business demands such as making payroll, obtaining lines of credit and paying insurance.

Recently, on almost a daily basis, the Department is receiving requests to reduce, restructure or suspend penalties for enforcement actions that are either pending or final. While it is a significant resource challenge for us to fully consider all these requests, these kinds of requests are not new or without precedent. In fact, our Civil Penalty Policy and Supplemental Environmental Project (SEP) Policy allows staff to exercise prudent judgment and to utilize certain flexibility when structuring penalties under exactly the kinds of fiscal uncertainties that so many of our regulated community are currently facing.

So please, when these kinds of requests are under consideration, don't be afraid to use your sound judgment and to take advantage of the full range of flexibility afforded within our existing policies - as long as your actions are supportive of our environmental protection mission. Every one of us should do what we can, especially now, to consider ways in which we can avoid unduly harming struggling businesses while we get them back into compliance.

As a reminder, here are the factors specified in our Civil Penalty Policy that are available for possible adjustment of the gravity based portion of a penalty:

- A demonstrated inability to pay, including assessment of current documentation;
- Good faith efforts to comply;

- History of compliance that does not suggest a practice or pattern of non-compliance; and
- Other unique factors such as the risk and cost of litigation.

In addition, while not explicitly called out in the policy, you may also consider:

- The size of a regulated entity;
- Extending the schedule for payment;
- Seeking a financial security provision or collateral for the penalty payments; and
- Increasing the use of certain SEP options.

And let's not lose sight of the fact that our SEP Policy identifies and encourages certain SEP options or categories that provide critical benefits for public health, the environment and the economy, as well as serve the public interest, such as:

- Environmental assessment and auditing projects that focus on compliance including multi-media;
- Projects that reduce the regulated entities' environmental footprint such as pollution prevention projects including recycling, conservation or increased efficiency in the use of energy, water or other materials; and
- Pollution reduction/waste minimization projects.

Including these SEP's as part of any enforcement settlement ensures that the regulated entity invests in the type of infrastructure that will minimize their adverse environmental impact, return to compliance and stay in compliance in ways that enhance their underlying business practices. What more could anyone ask for during hard fiscal times?

Thank you for all your efforts to protect and preserve our environmental resources. If you have suggestions for ways in which we can improve our enforcement or take other actions to help us navigate through this fiscal crisis, please let me know. All your ideas would be welcomed and appreciated.